No. 5272

In the

United States Circuit Court of Appeals

For the Ninth Circuit

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FRANCIS H. HARDY
Appellant
vs.
NORTH BUTTE MINING COMPANY,
a corporation
Appellee

Upon Appeal from the United States District Court
for the District of Montana

Appellant's Reply Brief

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Appellant's Reply Brief

Pursuant to leave given at the close of the hearing of this appeal, a brief has been filed by Messrs. Charles R. Leonard and J. A. Poore as *amici curiae*. The points made have been fully discussed in appellant's opening brief and no extended reply seems necessary.

We pass with brief comment only the comments of counsel appearing at page 49 of their brief. The intimation that the receivership is designed to wreck the defendant corporation and to wipe out

the property rights of the stockholders, we assume will not be permitted to influence the decision of the court. Nothing in the record gives any warrant for accusations of this kind and, as the bill indicates, the purpose of the receivership is just the contrary. Without the intervention of receivers there is imminent danger of attacks by many creditors the result of which will be the sacrifice of the assets of the company, to the great loss of the company and its stockholders.

We answer the argument of counsel as follows:

1. Complainant, though a simple contract creditor, took the position of a judgment creditor by reason of the answer and consent filed by defendant. The answer of defendant did not operate to confer jurisdiction, but instead to waive a defense available to the defendant company.

2. Upon the record the authority of the secretary of the company to consent for the defendant company, and the authority of defendant's solicitor to file an answer admitting the allegations of the bill, are not open to question. In the absence of any showing to the contrary there is a conclusive presumption of authority on the part of the solicitor who on behalf of the company signed and filed its answer.

3. The action taken by Judge Bourquin was not the vacation, within the same term, of an order improvidently or inadvertently made. Without any

showing of improvidence or inadvertence and at a later term the court discharged the receivers and dismissed the case. This was a reversal of a decision of a coordinate judge in the same court at a later term with no change in the record. Without an affirmative showing and a change in the situation evidenced by moving papers by way of intervention or otherwise, the court was without power to take this step.

I.

The brief of *amici curiae* apparently does not challenge the sufficiency of the bill except in that it shows complainant to have been a simple contract creditor only; and it is perhaps not open to argument that if complainant had been a judgment creditor the bill would be considered sufficient to invoke the discretionary power of the court to appoint receivers. Although the defendant corporation had assets valued at a sum greater than the amount of its liabilities, there were no liquid assets available for the payment of overdue obligations, and if complainant levied execution or attached, and other creditors in large numbers took like action (and the bill alleges imminent danger of this), the result would be a conflict of liens and an ultimate sacrifice of the assets of the defendant corporation, to the detriment of complainant and other creditors, and to the loss of the defendant

and its stockholders. In such a situation the courts have not hesitated to lend their aid through the medium of a receivership. Many instances of this appear in the books and citation of authority seems unnecessary. The principle apparently is conceded by counsel.

Counsel confuse the question of jurisdiction of the court with the question of its discretionary power, and mistakenly assume that the consent of the defendant corporation was relied upon to confer jurisdiction not otherwise existing. The bill stated the facts showing jurisdiction of the parties and of the subject matter, but without the waiver of the defendant corporation the court would not have exercised the power of appointing receivers. *In re Reisenberg,* 208 U. S. 90, and other cases (cited in appellant's opening brief) make clear that defendant has a right to object to the appointment of receivers upon the petition of a simple contract creditor. But this is a defense which may be waived, and as the court says in the Reisenberg case, "when waived the case stands as though the objection never existed." In effect the waiver of this objection places the complainant in the position of a judgment creditor; and the discretionary power of the court to direct receivership is no longer open to question.

The bill therefore was adequate to establish jurisdiction. The consent of the defendant to the

appointment of receivers did not operate to confer jurisdiction but rather to remove an objection to the exercise of the court's discretionary power which otherwise could have been made by defendant.

II.

The court will note, on the question of the validity of defendant's waiver and consent, that no one claiming any interest in the matter has undertaken by intervention or otherwise to challenge the authority of the secretary of the company to execute the consent to the appointment of receivers. The consent was executed on the 8th day of June, 1927 (Transcript of Record, pp. 23, 24), and if the act of the secretary in executing and filing this document was beyond his authority, certainly there has been ample opportunity since for the corporation or anyone interested to appear and make that fact known. This court cannot assume that the corporation had not taken such steps as may have been required by its articles of incorporation and by-laws, to vest the secretary with power to do what was done here. The corporation may speak through any officer it may select and unless a showing is made that no such authority was in fact given the officer who has acted, the question is foreclosed.

It should be said also that after the appeal to this court was perfected there were filed, in support of a motion to expedite the hearing, affidavits showing that the secretary had been given express authority by the corporation to sign the answer and consent.

The argument of the brief of *amici curiae* on this point overlooks the fact that in addition to the filing of the consent the validity of which is challenged, the defendant corporation appeared through its solicitor and filed an answer admitting the allegations of the bill; and it is the waiver resulting from this answer, as much as the consent itself, which permits the exercise of the discretionary power to appoint receivers in a case brought by a simple contract creditor. The cases cited in appellant's opening brief make this clear. When the corporation appears and answers and does not make the point that complainant is a simple contract creditor and may have a remedy (though perhaps not wholly adequate) at law, there is no one then in a position to say that the application for receivership cannot be considered because complainant's claim has not been reduced to judgment.

Therefore, without any consent to the appointment of receivers, an appearance and an answer on the part of the defendant waiving the point that complainant is not a judgment creditor and has no lien, removes any doubt of the power of the court

to proceed. The record here shows that such an answer was duly filed, signed not only by the secretary of the company but by its solicitor, both in the original proceeding in the District Court for the District of Minnesota, Fifth Division (Transcript of Record, p. 22) and in the present case (Transcript of Record, p. 56).

In the absence of any showing to the contrary, there is a conclusive presumption that a solicitor thus signing and filing an answer on behalf of a litigant was duly authorized to act.

Kynerd v. McCarthy, et al., 3 Fed. (2d) 32.

Drew v. Burley, et al., 287 Fed. 916.

In re Gasser, 104 Fed. 537.

Underfeed Stoker Co. of America v. American Ship Windlass Co., et al., 165 Fed. 65.

Osborn v. U. S. Bank, 9 Wheat. 738, 830.

Hill v. Mendenhall, 21 Wallace 453.

Ritchie v. McMullen, 159 U. S. 235.

In re Miller's Estate (*Welcher v. Houston*), 223 Pac. 851.

Rutledge v. Waldo, et al., 94 Fed. 265.

Schieber v. Hamre, 10 Fed. (2d) 119.

These cases establish that when an attorney appears and signs an answer or consent the presumption of law is that he has authority from defendant so to act. In the absence of any showing to the contrary in the record, this presumption is conclu-

sive and the burden is on the opposing party to show that the solicitor did not have the authority he attempted to exercise. There is nothing in the record here even to suggest that the act of the solicitor for defendant corporation in signing and filing an answer was not authorized. Without proof of lack of authority the question here is not open to discussion.

III.

Complainant accepts without question the rule of the cases and texts cited in the brief of *amici curiae* on the question of the authority of the court to annul or reverse the order appointing receivers. It is of course true that there is power to terminate a receivership *"upon a showing* affecting the propriety of the original action of the court." And it is also true that if the original order was for any reason absolutely void, it may be abrogated by the court of its own motion.

But the record here includes no showing of any kind in any manner affecting the propriety of the original order appointing the receivers. The order to show cause (Transcript of Record, p. 177) suggests that the original order may have been mistakenly and improvidently made, but no showing was made by anyone of any improvidence or inadvertence. Indeed, the final action taken by the court in discharging the receivers and dismissing

the case, does not treat the original order as void but recognizes it and undertakes to reverse it. Upon the principle of the cases cited in appellant's opening brief, Judge Bourquin was without power to substitute his judgment for that of Judge McNary, upon the same record and without any change in the situation of the case.

The case is not one in which the court has undertaken, during the term at which an order was entered of record, to set aside or vacate such order. As the record shows, Judge McNary was designated to hold a term of court in the District of Montana during the month of June, 1927. The action of Judge Bourquin was not taken in response to any application made during this June special term, and after the expiration of the term the court was without power, on the same record, to set aside and vacate the order.

The case is one of the exercise of a discretionary power, by Judge McNary, upon appropriate pleadings, and any contention that there was improvidence or inadvertence in the court's action of necessity contemplates a showing to that effect. "Improvidence" or "inadvertence", as the term is employed in the cases, means negligence or carelessness, and we think it clear that upon a debatable point of law (if indeed the point is debatable) a difference of opinion between two coordinate

judges of the same court does not show improvidence or inadvertence.

It is of course obvious that if the facts had been incorrectly presented to Judge McNary, a showing to that effect would justify the conclusion that the original order had been made improvidently or inadvertently. No such showing has been attempted here and the rule invoked by counsel has no application.

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